

JUN 13 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of Commission's)	MM Docket No. 94-34
Equal Employment Opportunity)	
Rules)	

COMMENTS

U S WEST Communications, Inc. ("U S WEST"), through counsel, and pursuant to the Federal Communications Commission's ("Commission" or "FCC") Notice of Inquiry in the above-captioned docket,¹ hereby files its comments.

I. INTRODUCTION

In the 1992 Cable Act, Congress found that "females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries"² and adopted statutory provisions relating to equal employment opportunity ("EEO").³ Congress extended these EEO requirements to cable operators and defined "cable operators," for EEO purposes, to include any "multichannel video programming

¹In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, MM Docket No. 94-34, Notice of Inquiry, FCC 94-103, rel. Apr. 21, 1994 ("NOI").

²Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992) § 22(a)(1) ("1992 Cable Act" or "Act"); H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992), at 41 ("1992 House Report").

³47 USC § 554.

distributor."⁴ Section 522(12) of the Act defines a multi-channel video programming distributor as:

a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

In its Order implementing the EEO provisions of the Act,⁶ the Commission adopted rules limiting the scope of these provisions to "those entities which have control over more than one channel of video programming provided directly to the public."⁷ Thus, "[m]ultichannel video programming distributors do not include any entity which lacks control over the video programming distributed."⁸ Since local exchange carrier ("LEC") video dialtone (or "VDT") service providers are not permitted either to control the provision of video programming⁹ provided over their VDT networks¹⁰ or to provide video programming

⁴47 USC § 554(h)(1).

⁵47 USC § 522(12).

⁶In the Matter of Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, 8 FCC Rcd. 5389 (1993) ("Order").

⁷Id. at 5398 ¶ 45.

⁸Id. at 5402, Appendix B (to be codified at 47 CFR § 76.71(a)).

⁹The Cable Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 USC § 522(19).

¹⁰47 CFR § 63.54(d).

directly to the public,¹¹ LEC VDT providers are not subject to the Cable Act's EEO provisions.¹²

The 1992 Cable Act also directed the Commission to submit a report to Congress within two years on the effect and operation of the Act's EEO provisions.¹³ The Commission's NOI represents its initial step in fulfilling this requirement. The NOI deals almost exclusively with the EEO requirements for the broadcast and cable television industries. However, in closing, the Commission asks whether its EEO policies should be expanded to include common carrier technologies (e.g., video dialtone) that compete with broadcast and cable services.¹⁴ In the comments which follow, U S WEST addresses this issue.

¹¹47 USC § 533(b)(1), (2).

¹²However, as the Commission notes in its Order, program service providers using LEC video dialtone service to deliver video programming to subscribers would be subject to the Cable Act's EEO requirements. See Order, 8 FCC Rcd. at 5398-99 ¶ 46. Similarly, if LEC VDT providers are allowed to provide video programming directly to subscribers in the future, they will be subject to whatever EEO provisions are in effect at that time.

¹³"Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." 1992 Cable Act, 106 Stat. 1500 § 22(g).

¹⁴NOI ¶ 39.

II. EXPANDING EEO REQUIREMENTS TO TELEPHONE COMMON CARRIERS WAS NEVER CONTEMPLATED BY THE CABLE ACT

In adopting the EEO provisions of the 1992 Cable Act, Congress made findings with respect to the employment of minorities and females in the cable and broadcasting industry¹⁵ and established EEO requirements. No findings were made with respect to employment of minorities and females in the telecommunications industry, nor were telecommunications providers specifically referenced in any statutory provisions relating to EEO. While it is possible to include LEC providers of video dialtone within the Act's definition of a multichannel video program distributor ("MVPD"),¹⁶ it is difficult to argue that Congress intended to include LECs within the scope of its EEO requirements for the cable and broadcast industries. In implementing the Cable Act's EEO provisions, the Commission focused on "control over video programming" as the primary factor in determining whether an entity was an MVPD for purposes of applying the Act's EEO provisions.¹⁷ The Commission's adoption of the "control" test was rational, given the Cable Act's goal of favoring program diversity¹⁸ and its failure to specifically

¹⁵See supra note 2.

¹⁶Arguably, LEC providers of video dialtone are included in the definition of what constitutes a MVPD since the statutory definition includes the language "but not limited to."

¹⁷See supra notes 8 & 9.

¹⁸In adopting the Cable Act's EEO provisions, Congress found that "increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media". 1992 Cable Act, (continued...)

include telecommunications common carriers. No statutory purpose would be served by extending the Cable Act's EEO provisions to LECs providing VDT service. Clearly, if LECs are allowed to provide video programming at some time in the future and the Cable Act's EEO requirements have been upheld against any intervening legal challenge, then the LECs would become subject to the Act's EEO requirements.¹⁹

III. LEC VIDEO DIALTONE PROVIDERS ARE ALREADY SUBJECT TO A WIDE RANGE OF EEO REQUIREMENTS

U S WEST and other potential VDT providers are subject to a plethora of EEO requirements, including FCC EEO requirements.²⁰ U S WEST is committed to complying with both the spirit and the letter of these requirements. Attachment 1 contains a summary of the EEO requirements which currently apply to U S WEST.²¹ Extension of the Cable Act's EEO requirements to telecommunications common carriers would only increase the already significant administrative burden of EEO compliance with little or no corresponding benefit.

¹⁸(...continued)
106 Stat. 1498 § 22(a)(2), 1992 House Report at 41. See also Order, 8 FCC Rcd. at 5398 ¶ 45. The idea that the government can create or advance "diversity in expressions" indirectly through hiring practices, when that same government might well be constitutionally constrained from advancing such diversity directly through governmental action, raises serious issues.

¹⁹If this occurs, the Commission should take whatever actions are necessary to eliminate any duplicative and overlapping reporting and compliance requirements that may be contained in its Rules.

²⁰See 47 CFR § 21.307.

²¹This summary is not meant to be all inclusive.

Congress found that minorities and women are not employed in significant numbers in managerial positions in the broadcast and cable television industries -- not in the telecommunications industry. It makes little sense to try to remedy this problem by extending what are essentially broadcast and cable television EEO requirements to telecommunications common carriers.

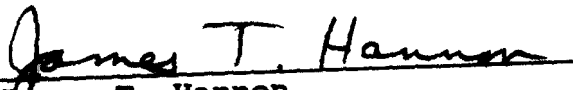
IV. CONCLUSION

For the foregoing reasons, the Commission should not expand the Cable Act's EEO requirements to include LEC video dialtone providers.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By:


James T. Hannon
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2860

Its Attorney

Of Counsel,
Laurie J. Bennett

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ATTACHMENT 1

**FEDERAL EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION LAWS, EXECUTIVE
ORDERS, AND AGREEMENTS GOVERNING HUMAN RESOURCES ISSUES WITHIN U S WEST COMPANIES**

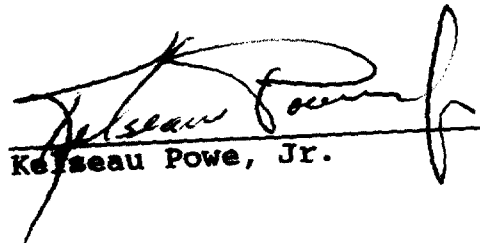
<u>Common Title</u>	<u>Cite</u>	<u>Who Applies To</u>	<u>Annual Reporting Forms</u>	<u>Basic Requirements</u>
Title VII of the Civil Rights Act of 1964	42 USC § 2000(e), <u>et seq.</u>	Private employers with 15 or more employees and others	Standard Form 100 (EEO-1) (must be filed only by employers with 100 or more employees) 28 CFR § 1602.7	Prohibits discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment on the basis of race, color, religion, sex, or national origin. Administered by EEOC.
Age Discrimination in Employment Act of 1967 (ADEA)	29 USC § 621, <u>et seq.</u>	Private employers with 20 or more employees and others	None	Protects applicants and employees 40 years of age or older from discrimination on the basis of age in hiring, promotion, discharge, compensation, terms, conditions, or privileges of employment. Administered by EEOC.
Americans with Disabilities Act of 1990 (ADA)	42 USC § 12101, <u>et seq.</u>	Private employers with 15 or more employees and others	None	Protects qualified applicants and employees with disabilities from discrimination in hiring, promotion, discharge, pay, job training, fringe benefits, classification, referral, and other aspects of employment on the basis of disability. The law also requires that covered entities provide qualified applicants and employees with disabilities with reasonable accommodations that do not impose undue hardships. Administered jointly by EEOC and OFCCP.
Equal Pay Act of 1963	29 USC § 206 (Part of Fair Labor Standards Act which begins at 29 USC § 201)	Private employers (no lower limit on number of employees) and others	None	Prohibits sex discrimination in payment of wages to women and men performing substantially equal work in the same establishment. Administered by EEOC.
Section 503 of the Rehabilitation Act of 1973	29 USC § 701, <u>et seq.</u>	Employers holding federal contracts or subcontracts for \$2,500 or more. (Employers with 50 or more employees and contract of \$50,000 or more must have affirmative action program. Proposed revisions raise this to 150 or more employees and contract over \$150,000.)	Standard Form 100 (EEO-1) 41 CFR § 80-741.8	Prohibits job discrimination because of disability and requires affirmative action to employ and advance in employment qualified individuals with disabilities who, with reasonable accommodation, can perform the essential functions of a job. Administered by OFCCP.

<u>Common Title</u>	<u>Cite</u>	<u>Who Applies To</u>	<u>Annual Reporting Forms</u>	<u>Basic Requirements</u>
Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRA)	38 USC § 4212, et seq.	Employers holding federal contracts or subcontracts for \$10,000 or more. (Em- ployers with 50 or more employees and contract of \$50,000 or more must have affirmative action program.)	Federal Contractor-Veterans' Employment Report (VETS-100) 41 CFR § 61-250.10	Prohibits job discrimination and requires affirmative action to employ and advance in employment qualified Vietnam era veterans and qualified special disabled veterans. Administered by OFCCP.
Communications Act of 1934	47 USC § 151, et seq. (See 47 CFR § 21.307 and others which implement EEO goals of the FCC)	Common carriers, broad- casters, cable companies, and others regulated by FCC	Form 385 Annual Employment Report 47 CFR § 1.815	Prohibits employment discrimination based on sex, race, color, religion, or national origin. Requires establishment and filing with FCC an equal opportunity program and annual reporting on employment.
Executive Order 11141	-	Employers holding federal contracts or subcontracts for \$10,000 or more	None	Prohibits discrimination against applicants and employees in employment practices and decisions on the basis of age. No agency has been given specific authority to administer.
Executive Order 11246	-	Employers holding federal contracts or subcontracts for \$10,000 or more. (Em- ployers with 50 or more employees and contract of \$50,000 or more must have affirmative action program.)	Standard Form 100 (EEO-1) 41 CFR § 60-1.7	Prohibits job discrimination on the basis of race, color, religion, sex, or national origin and requires affirmative action to ensure equality of opportunity in all aspects of employment. Administered jointly by EEOC and OFCCP.
Executive Order 11825	-	Employers holding federal contracts for \$10,000 or more	Periodic reports of subcontracting	Provides for maximum practicable opportunity for minority-owned businesses to participate in performance of government contracts by requiring federal contractors to establish programs to enable MBEs to be considered fairly and encourages their competition for such work. Requires contractors to submit periodic reports of subcontracting, as requested by government. Administered by OFCCP.
Executive Order 11701 of 1973	-	Employers holding federal contracts or subcontracts for \$10,000 or more	None	Prevents discrimination against Vietnam era veterans (see VEVRA above). Administered by OFCCP.

<u>Common Title</u>	<u>Cite</u>	<u>Who Applies To</u>	<u>Annual Reporting Forms</u>	<u>Basic Requirements</u>
Executive Order 11758 of 1974	-	Employers holding federal contracts or subcontracts for \$2,500 or more	None	Prevents discrimination against handicapped (see Rehabilitation Act above). Administered by OFCCP.
Executive Order 12138	-	Employers holding federal contracts for \$10,000 or more	Periodic reports of subcontracting	Provides for minimum practicable opportunity for women-owned businesses to participate in performance of government contracts by requiring federal contractors to establish programs to enable WBEs to be considered fairly and encourage their competition for such work. Requires contractors to submit periodic reports of subcontracting, as requested by government. Administered by OFCCP.
Standard Affirmative Action Format (SAAF) and National Reporting System (NRS) (formerly National Self-Monitoring Reporting System (NSMRS))	OFCCP Order 810e4, 12/21/82	Multi-establishment employers with homogeneous personnel policies. (Former Bell System companies and their subsidiaries have such agreements.)	RBOC Agreements Report 1 - Regional Job Group Summary (annual). Reports 2 and 3 are required only when Report 1 shows under-utilization in a job category.	Agreements signed by RBOCs require affirmative action and annual reporting of hiring and employment practices to prevent discrimination on basis of race, color, national origin, religion, sex, or age. Consists of two agreements, SAAF and NRS, signed in 1986 and 1987, respectively, between the OFCCP and Bell System companies. Replaced the NSMRS, which had been in effect since 1982, and contained many of the same provisions. Administered by OFCCP.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 13th day of June, 1994, I have caused a copy of the foregoing **COMMENTS** to be served via hand delivery upon the persons listed on the attached service list.


Kelseau Powe, Jr.

Roy J. Stewart
Federal Communications Commission
Room 314
1919 M Street, N.W.
Washington, DC 20554

Hope Cooper
Federal Communications Commission
Room 7218
2025 M Street, N.W.
Washington, DC 20554

International Transcription
Services, Inc.
Suite 140
2100 M Street, N.W.
Washington, DC 20037